

Exhibit D

1 **ABBOTT'S PROPOSED REVISION TO JUDGE WILKEN'S INSTRUCTION I.**
2 **ANTITRUST CLAIMS – PURPOSE OF ANTITRUST LAWS**

3 I will now discuss GSK's claims. GSK first alleges that Abbott violated the United
4 States antitrust laws by willfully maintaining a monopoly or attempting to acquire a monopoly.
5 The purpose of the antitrust laws is to preserve free and unfettered competition in the
6 marketplace. The antitrust laws rest on the central premise that competition produces the
7 best allocation of our economic resources, the lowest prices, the highest quality, and the greatest
8 materials progress. The antitrust laws exist, however, for the protection of competition, not
9 individual competitors.

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11 Source: ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases (2005
12 Ed.); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 US 477 (1977) (quoting *Brown Shoe*
13 *Co. v. United States*, 370 U.S. 294, 320 (1962)).

1 **GSK'S Objection**

2 Abbott's proposed amendment to Instruction I—to add that “[t]he antitrust laws exist,
 3 however, for the protection of competition, not individual competitors”—is unnecessary and
 4 confusing. The Court's Instruction I from the first trial already reflects the ABA model
 5 instructions, nearly verbatim. *See* ABA Section of Antitrust Law, Model Jury Instructions in Civil
 6 Antitrust Cases (2005 ed.), Instruction A-2. Abbott's proposed new language is not found in the
 7 ABA model instructions.

8 The ABA model instructions, adopted by the Court, already explain the purpose of the
 9 antitrust laws and their focus on preserving competition.¹ The Court's Instruction I is neutral and
 10 direct. Abbott's additional sentence, on the other hand, may mislead the jury into believing that
 11 merely because GSK is a “competitor,” the antitrust laws should not protect it. There is no
 12 legitimate justification for Abbott's change.

13 GSK respectfully requests that the Court preserve its Instruction I as given to the jury in
 14 2011.

15 **Abbott's Response**

16 GSK does not (and cannot) dispute that Abbott's proposed language properly states the
 17 law, as articulated by the U.S. Supreme Court on numerous occasions. *See Brunswick Corp. v.*
 18 *Pueblo Bowl-O-Mat, Inc.*, 429 US 477 (1977) (quoting *Brown Shoe Co. v. United States*, 370
 19 U.S. 294, 320 (1962)). There also can be no dispute that the Court has previously adopted
 20 instructions that differ from the model instructions where it concluded that such changes were
 21 appropriate and necessary to guide the jury. *See, e.g.*, Dkt. #468 at 2:5-11 (arguing that Court
 22 should not add language describing monopoly power as ability to “handicap” competition that
 23 does not appear in ABA model instructions) & Dkt. #485 at 11:10-21 (including such language);

24 ¹ Notably, at the previous trial, Abbott objected to GSK's proposal to use the ABA's model
 25 instruction on the purpose of antitrust laws. Abbott argued that the “proposed instruction
 26 improperly introduces the purported general purpose of the Sherman Act into the jury's
 27 deliberation, implicitly inviting the jury to deviate from the applicable legal standards in favor of
 28 the purported general purpose of the act.” Dkt. 349 at 47. The Court ultimately rejected Abbott's
 argument and adopted the model instruction.

1 Dkt. #468 at 6:20-23 (arguing for inclusion of ABA model instruction language regarding mixed
2 motives and refusal to deal) & Dkt. #485 at 18:24-20:2 (omitting proposed language from the
3 ABA model instruction).

4 Here, there is good cause to adopt Abbott's proposed modification because there is a
5 substantial likelihood that jurors could conflate a non-actionable injury to GSK with an injury to
6 *competition*. In contrast to the initial trial, which began with the inclusion of the direct purchaser
7 plaintiffs, the retrial involves only a dispute between two competitors. Absent Abbott's proposed
8 instruction, jurors could readily regard legitimate competition between the parties as
9 anticompetitive conduct. Accordingly – and contrary to GSK's argument that this modification
10 will confuse or mislead the jury – this modification is necessary to *prevent* confusion among jurors
11 tasked with distinguishing between legitimate competition and anticompetitive conduct that
12 violates the Sherman Act.

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1 **ABBOTT'S PROPOSED DETRIMENTAL RELIANCE INSTRUCTION**

2 GSK contends that it was injured because Abbott failed to disclose that it was
3 considering raising the price of Norvir during the time of the negotiation of the license
4 agreement. To make the required showing that this alleged failure to disclose was a
5 proximate cause of its injury, GSK has the burden to show actual reliance on the alleged failure
6 to disclose, i.e., if it were not for the alleged failure to disclose, GSK would likely have avoided
7 injury altogether.

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9 Source: *Bumpers v. Community Bank of Northern Va.*, 747 S.E.2d 220 (N.C. 2013).

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1 **GSK'S Objections**

2 Abbott's proposed "reliance" instruction is improper and unnecessary. As a preliminary
 3 matter, reliance is only arguably relevant to a UDTPA claim to the extent that the claim is based
 4 on a misrepresentation. As this Court found in its order denying Abbott's Renewed Motion for
 5 Judgment as a Matter of Law ("RJMOL Order"), reliance is not an element of a UDTPA claim
 6 based on unfair conduct. Dkt. 591 at 15.² Of the three factual findings underpinning GSK's
 7 UDTPA claim, two are clearly unfair conduct and do not involve misrepresentations. *See* Jury
 8 Instr. p. 27, Additional Questions, 2-3. Consequently, a reliance instruction is plainly
 9 inappropriate for these UDTPA violations and would only serve to confuse the jury.

10 As to the remaining factual finding underpinning GSK's UDPTA claim (i.e., Abbott's
 11 deliberate withholding of its plans to limit competition), that claim, too, is based, in part, on unfair
 12 conduct and, in part, on a misrepresentation by omission. *See* Jury Instr. p. 27, Additional Question
 13 1; *see also* RJMOL Order, Dkt. 591 at 15 (holding that "to the extent GSK's UDTPA claim is based
 14 on a breach of contract" it constitutes "unfair conduct" (rather than a misrepresentation)). Even if
 15 that claim reflected purely a misrepresentation, no separate reliance instruction would be necessary.
 16 This Court has previously explained that to the extent reliance is part of a UDTPA claim, it is
 17 incorporated into the determination of proximate cause. Mot. to Dismiss Order 4/11/08, Dkt. 82,
 18 n.14. Reliance is not independently required, but may be considered in determining causation.
 19 *See ABT Bldg. Products Corp. v. Nat'l Union Fire Ins. Co. Of Pittsburgh*, 472 F.3d 99, 126 (4th
 20 Cir. 2006) (finding that causation *may be shown* by detrimental reliance on a misrepresentation).
 21 The Court's jury instructions as provided in the first trial already direct the jury to consider
 22 proximate causation. Jury Instr. 28. Therefore, an additional reliance instruction is unnecessary
 23 even for the UDPTA claim concerning Abbott's withholding of information from GSK.

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25 ² Unfair conduct encompasses a wide range of conduct that "offends established public
 26 policy...[or] is immoral, unethical, oppressive, unscrupulous, or substantially injurious to
 27 consumers." *Marshall v. Miller*, 302 N.C. 539, 548 (1981). A UDTPA violation consists of
 28 unfair *or* deceptive conduct and need not include both. *Gilbane Bldg. Co. v. Fed. Reserve Bank of
 Richmond, Charlotte Branch*, 80 F.3d 895, 903 (4th Cir. 1996).

1 **Abbott's Response**

2 Although GSK is correct that reliance is required for only one of its UDTPA theories (the
 3 misrepresentation or omission theory), the jury needs to be instructed on that theory if GSK
 4 actually pursues it. And Abbott's proposed instruction makes clear that it applies only to the
 5 extent that the GSK claim is that Abbott omitted to make a disclosure it should have made – that is
 6 “Abbott failed to disclose . . .”

7 GSK is wrong in arguing that reliance becomes irrelevant if it argues that there was some
 8 unfairness also involved in the alleged misrepresentation or omission. First, under North Carolina
 9 law, “[l]ooking for alternatives to a current contract without notifying the other contracting party
 10 is not itself unfair or deceptive.” *Rahamankhan Tobacco Enters., Pvt. Ltd. v. Evans McTavish
 11 Agricraft, Inc.*, 989 F. Supp. 2d 471, 478 (E.D.N.C. 2013) (citing *Tar Heel Indus., Inc. v. E.I.
 12 DuPont de Nemours & Co.*, 370 S.E.2d 449, 452 (1988)). It is precisely because in this context
 13 the law specifically defines what is and is not “unfair” that it is important for the Court to use
 14 instructions that specifically apply the theories that GSK is pursuing to the elements of the claim.

15 Second, one can always argue that in some sense (even if not in a legally actionable sense)
 16 a misrepresentation or omission was unfair – there is little conduct that the law makes actionable
 17 that could not be argued to be in some sense unfair. But North Carolina has clearly distinguished
 18 between a: “misrepresentation or omission” theory and an “unfairness” theory. If GSK wants to
 19 pursue the misrepresentation or omission theory, it should not be permitted to evade an
 20 appropriate jury instruction on that theory. Binding precedent from the North Carolina Supreme
 21 Court states that “conduct tantamount to fraud . . . **requires reliance**, and we see no reason for
 22 departure from that requirement.” *Bumpers v. Community Bank of Northern Va.*, 747 S.E.2d 220,
 23 226 (N.C. 2013) (emphasis added). In *Bumpers*, the North Carolina Supreme Court found that the
 24 trial court had erred by “finding proximate cause without considering whether plaintiffs presented
 25 sufficient evidence of reliance.” *Id.* at 227.

26 Finally, GSK is also wrong in its argument that a separate reliance instruction is
 27 superfluous because reliance is implicit in the concept of proximate cause. The North Carolina
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1 Supreme Court has required that a plaintiff specifically “demonstrate reliance on the
2 misrepresentation in order to show the necessary proximate cause.” *Id.* at 226. It would be totally
3 contrary to this precedent for the jury instructions to gloss over the concept of reliance. *See also*
4 *id.* at 227 (“Reliance, in turn, demands evidence ‘show[ing] that the plaintiff suffered actual injury
5 as a proximate result of defendant’s deceptive statement or misrepresentation.’”).³

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25 ³GSK cites the Fourth Circuit’s decision in *ABT Building Prods. Corp. v. Nat’l Union Fire Ins.*
Co., 472 F.3d 99 (4th Cir. 2006). In that case, the court merely noted that, at the time, ““what
26 constitutes proximate cause between a deceptive act and a plaintiff’s damages remains
ambiguous,” *id.* at 126, but the Court nevertheless found that the jury had sufficient evidence “for
27 a finding of detrimental reliance.” *Id.* at 127. In the subsequent *Bumpers* case, the North Carolina
Supreme Court resolved the ambiguity.

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